



# Oregon

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April 7, 2011

TO: Land Conservation and Development Commission  
FROM: Jerry Lidz, Acting Director  
SUBJECT: **Agenda Item 5, April 21-22, 2011, LCDC Meeting**

## DIRECTOR'S REPORT

### I. INFORMATION UPDATES

#### A. PARTICIPATION IN APPEALS, AND RECENT LUBA AND APPELLATE COURT OPINIONS

ORS 197.090(2) requires the Director of the Department of Land Conservation and Development (DLCD) to report to the Land Conservation and Development Commission (the commission or LCDC) on each appellate case in which the department participates, and on the position taken in each such case.

ORS 197.040(1)(c)(C) requires LCDC to review recent Land Use Board of Appeals (LUBA) and appellate court decisions to determine whether goal or rule amendments are needed.

#### 1. Department participation in appeals

Between February 16 and March 28, 2011, the department received copies of 14 notices of appeal filed with LUBA. The department filed none of these notices.

#### 2. LUBA opinions

Between February 16 and March 28, 2011, the department received copies of 16 recently issued LUBA opinions. Of these, LUBA dismissed 6, remanded 6, reversed 0, affirmed 4, invalidated no local decisions, and transferred no petitions to circuit court.

Four decisions concern the application or interpretation of a statewide planning goal or LCDC administrative rule:

- **OAR 660-012-0060(1) & (3) (Transportation Planning Rule, or TPR), *Setniker v. Polk County*, LUBA No. 2010-57:** LUBA remanded the county's decision on remand to

approve the addition of 124 acres of land zoned Exclusive Farm Use to the county inventory of significant mineral and aggregate resources, re-zoning the land to Mineral and Aggregate overlay, and a conditional use permit for aggregate mining. On the second appeal, LUBA found lack of compliance with the TPR. The county (1) failed to update the end of its planning period to the year 2030 to be consistent with its 2009 TSP; (2) failed to address the impacts of development on the southbound left turn movement; (3) did not have substantial evidence to support its finding that any unmitigated impacts will not significantly affect the State Highway 99/Clow Corner Road; (4) failed to update to the year 2030 the impacts on the Highway 99/Hoffman Road intersection; and 5) failed to include the ESEE analysis in the comp plan.

- **Goal 11, OAR 660-012-0060 (the TPR), and OAR 660-011-0045(2) (a), Willamette Oaks, LLC v. City of Eugene**, LUBA Nos. 2010-060, 2010-061 and 2010-062: LUBA denied all assignments of error based on the TPR and Goal 11 but remanded the city's approval of a zone change, tentative planned unit development, and adjustment to develop 583 dwellings and a commercial building on 23 acres because of a procedural error.
- **OAR 660-012-0060 (the TPR), Central Oregon Landwatch v. Deschutes County**, LUBA Nos. 2010-075 & 2010-076: LUBA denied all assignments of error, including the one regarding the TPR, and affirmed the county's adoption of destination resort mapping procedures. The county is not required to make a "significant effect" determination and consider adopting remedial measures for transportation facilities until specific sites are added to the Destination Resort Eligible Lands Map.
- **Goal 3 and OAR 660-004-0020(2) (a), Guy Hamilton, et al v. Jackson County**, LUBA No. 2010-112: LUBA affirmed the county's approval of a 199-foot-tall AM radio broadcast tower on a portion of a parcel zoned Exclusive Farm Use. A Goal 3 "reasons" exception was not required.

None of these decisions require goal or rule amendments.

### 3. Appellate court opinions

Between February 16 and March 28, 2011, the department received copies of six recently issued opinions from the Court of Appeals. Two are of interest:

- **OAR 660-009-0005(11) and 660-009-0015(2), Friends of Yamhill County, et al v. City of Newberg**, Court of Appeals No. A146619, LUBA No. 2010-015: The court affirmed LUBA's remand of the city's economic opportunities analysis and rejected the assignments of error that LUBA had rejected. The key issue was the definition of "necessary" in the phrase "attributes of a site necessary for a particular industrial or other employment use to operate" (OAR 660-009-0005(11)), commonly known as site need characteristics, which are used in accordance with Goal 14 and its rule to determine which urban lands within an existing urban growth boundary and which rural lands for potential inclusion in the urban growth boundary are suitable for a city's employment needs.

- **Goals 4, 11 & 14, and OAR 660-006-0025(4) (e), *Campers Cove Resort, LLC v. Jackson County***, Court of Appeals No. A145328, LUBA No. 2009-117: The county determined that (1) the mid-20<sup>th</sup> Century resort improvements on commercial forestland were non-conforming uses, and (2) the RV units that were installed in 2007 would require Goal 4, Goal 11, and Goal 14 exceptions before development could be expanded. The court affirmed LUBA's decision that the statement regarding the need for exceptions was *dictum* and not binding because it was beyond the scope of the land use application.

**4. Department appeals and other opinions of interest:**

- *ODOT and DLCD v. Klamath County*, LUBA Nos. 2007-198 & 2007-199: Remanded by LUBA on February 22, 2011 at the request of the parties.
- Regarding the Bend UGB amendment, *Rose & Associates, LLC v. City of Bend*, LUBA Nos. 2009-011 & 2009-020: Dismissed at the request of the parties.

**5. Appeal notices of interest: None.**

**B. GRANTS, INTERGOVERNMENTAL AGREEMENTS AND CONTRACTS**

The community services division manager prepared a memo for signature by the LCDC Grants Advisory Committee and for distribution to the memberships of the Association of Oregon Counties (AOC) and the League of Oregon Cities (LOC). The memo requested that Oregon communities send a brief summary to the department outlining potential planning grant needs for 2011-2013. At the time of this report, the department has not received responses. Local government responses are intended to provide a baseline from which the committee will recommend priorities for grant funding in the coming biennium.

**II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES**

**A. COASTAL MANAGEMENT PROGRAM**

The department's coastal staff, led by Dale Blanton, Senior Coastal Policy Analyst, and Laren Woolley, Coastal Shorelands Specialist, worked closely with the Oregon Department of Justice to develop supplemental findings related to a remand of *Rudell v. City of Bandon* (LUBA 2010-037). The Land Use Board of Appeals (LUBA) remanded the decision by the City of Bandon to resolve factual issues related to the location of the foredune. In mid-March, the City of Bandon re-heard the application of Rudell and again denied the application for development on the parcel. The Rudells have subsequently filed a Notice of Intent to Appeal with LUBA.

Coastal staff met with local planners in Gold Beach on April 6 and in Tillamook on April 8. Approximately 35 people attended each meeting including city and county planners, and state agency staff. DLCD coastal staff visited the Bandon Marsh National Wildlife Refuge to see progress on a 400 acre restoration project, the Rudell property site in Bandon, the proposed Redfish Rocks interpretive center in Port Orford, and the Hunter Creek/Sebastian Shores erosion situation in Gold Beach.

Tanya Haddad, On-Line Services Administrator, Randy Dana, Coastal GIS Specialist, and Andy Lanier, Coastal Natural Resources Specialist attended the biennial GeoTools conference held in Myrtle Beach, SC, during the week of March 22-26. All three presented papers and participated in discussions and workshops with colleagues from around the country. The biennial conference is a leading venue for sharing information about geographic information technologies that support coastal management.

Paul Klarin, Marine Affairs Coordinator, has been working closely with the Ocean Policy Advisory Council (OPAC) Territorial Sea Plan Working Group (TSPWG) to develop a schedule of community meetings to review mapped data that will be used to support the amendments to the Territorial Sea Plan for ocean alternative energy development. Meetings will be held: Coos Bay area - April 21<sup>st</sup>, Brookings – April 29<sup>th</sup>, Port Orford – April 29<sup>th</sup>, Newport – May 13<sup>th</sup>, Garibaldi – May 26<sup>th</sup>, Warrenton – May 26<sup>th</sup>, Salem – June 3<sup>rd</sup>. The TSPWG will then review the results and schedule a second round of public meetings.

The Coastal Program is hosting a Sea Grant Fellow, Todd Hallenbeck, for three months to work with staff on ocean energy planning; he will then move to the Governor's Office to work on marine spatial planning issues on behalf of the West Coast Governors Agreement. Todd is a recent Masters graduate of California State University at Monterey Bay. To help Todd understand "the Oregon Way" for doing this kind of planning, he will manage the public comment aspects of the community meetings (above) and will work with Andy Lanier to ensure that public comments are easily submitted in several on-line formats.

## **B. COMMUNITY SERVICES**

Community Services Division staff are currently working with grant recipients to wrap up work tasks on grant-funded projects. The deadline for most project tasks to be submitted to the department is May 31, 2011. Following that date, the department will begin accepting and fulfilling final reimbursement requests. Once 2009-2011 reimbursements are complete, the program intends to get 2011-2013 funds awarded as quickly as possible and begin work on a new round of projects.

In March, Grant Young and Tom Hogue worked closely with the City of Arlington, Gilliam County and the Port of Arlington, as well as the governor's office and several agency partners to successfully negotiate a solution to meet Arlington's industrial land needs and to provide opportunities for economic development in Arlington. DLCD staff and local officials are working to complete the planning work in a joint effort with ODOT and DEQ and the governor's regional solutions team coordinator.

## **C. DIRECTOR'S OFFICE**

In addition to the various policy matters addressed below, activities in the director's office during March and early April included:

Week of March 7 – Department budget hearings, joint Target Rulemaking Advisory Committee (TRAC) and Policy Committee followed by a TRAC meeting, Natural Resources Cabinet, LCDC Legislative Subcommittee.

Week of March 14 – Transportation Planning Rule (TPR) briefing, several orientation meetings with department managers, Agency Heads meeting, TPR-Oregon Highway Plan (OHP) planning meeting, Retail Task Force/CREEC/ICSC joint meeting regarding the TPR-OHP, agency staff meeting.

Week of March 21 – Meeting to discuss TPR-OHP legislation, Natural Resources Cabinet, LCDC Legislative Subcommittee.

Week of March 28 - Meeting to discuss TPR-OHP legislation, House General Government and Consumer Protection Committee work session on House Bill 2129, meeting with Lynn Peterson, Joint Subcommittee on TPR-OHP, TRAC meeting, Climate Leadership Summit.

Week of April 4 – Meetings with legislators regarding bills affecting land use; Michael Jordan, State Chief Operating Officer; Richard Whitman, Governor’s Natural Resources Policy Advisor; LCDC Legislative Subcommittee; Greg Wolf, Governor’s Intergovernmental Relations and Regional Solutions Director.

#### **D. OPERATIONS SERVICES**

The Operations Services fiscal team continues preparing for calendar and biennium year-end activities which roll into the state’s Comprehensive Annual Financial Report (CAFR) and the Schedule of Expenditures of Federal Awards (SEFA) report. GASB 54 implementation is occurring with assistance from the Department of Administrative Services.

The budget officer is working with the director’s office and the operations services manager in continuing to ensure financial reporting accountability. Division managers continue their critical roles in ensuring timely expenditure projections for 2009-11. The department has received its 2011-13 Governor’s Balanced Budget and presented its budget to the Ways and Means Subcommittee on Natural Resources on March 7, 8 and 9. Additional budget development, processes and work session of the department’s budget is anticipated between now and June 30, 2011.

The information technology unit continues working with department management in evaluating and determining current and future technological needs for the department. The management team continues reviewing its teleconferencing capacity for department staff. Roll-out of a one page document to all staff describing approved teleconferencing tools has occurred. Roll-out of Windows 7 is underway.

## **E. PLANNING SERVICES**

Provisions of the National Flood Insurance Program (NFIP) that affect land use are administered in Oregon by DLCDC. The department's operations are funded through annual grants from the Federal Emergency Management Agency (FEMA). The FEMA grants have included the same level of funding for a number of years, but for 2011 the award has grown by nearly 50 percent.

One task FEMA requires the department to complete as part of the NFIP is performance of "community assistance visits." The community assistance visit is a visit to a community that serves the dual purpose of providing technical assistance to the community and assuring that the community is adequately enforcing its floodplain management regulations. Generally, a community assistance visit consists of a tour of the floodplain, an inspection of community permit files, and meetings with local appointed and elected officials. The additional funding will allow DLCDC to complete more community assistance visits, increasing the effectiveness of the program.

## **III. DEPARTMENT ORGANIZATIONAL AND MANAGEMENT INFORMATION**

### **A. NEW STAFF AND PROMOTIONS**

Effective March 7<sup>th</sup>, Jerry Lidz was appointed by LCDC as the department's Acting Director. Jerry has worked for the Department of Justice, most recently as the head of the Appellate Division, and with the Eugene City Attorney's office. Jerry is expected to be at the department for approximately four months.

### **B. DEPARTING EMPLOYEES**

Richard Whitman was appointed by Governor Kitzhaber as the Natural Resources Advisor on an interim basis starting March 4. He expects to return to the department in approximately six months to resume the director role.

### **C. RECRUITMENTS**

None.

## **IV. LCDC POLICY AND RULEMAKING UPDATES**

### **A. CURRENT RULEMAKING**

In addition to the TRAC and TPR rulemaking items on the commission's April agenda, two rulemaking advisory committees have finished their work and are forwarding their recommendations to LCDC for consideration at the June meeting. Because the draft rules may have the effect of limiting existing uses on agriculturally zoned lands, a Measure 56 notice has been sent to counties and some cities for distribution to property owners, notifying them of the June LCDC hearing. The M56 notices are required to be sent to counties by DLCDC 90 days in advance of possible approval by the commission, and so have now been sent by the department.

In addition, two bills have been introduced at the legislature affecting the subject matter of the commission's two rulemakings, and if successful, they would obviate the need for further action on the rulemaking. HB 3408 has passed the House, and would authorize placement of reservoirs by special districts and corporations as an outright use. HB 3595 is scheduled for a second hearing in House Energy Environment and Water, and would authorize local governments to conditionally approve siting of solar energy generation facilities not on high value farmland.

**1. Reservoirs on farmland**

OAR 660-033-0130 and 660-033-0120 Table 1 are proposed to be amended to clarify the process for approving off-site irrigation reservoirs on agricultural land, and to limit the approval of certain other on-site or adjacent uses that could conflict with the operation of irrigation reservoirs.

**2. Commercial solar facility siting on farmland**

The proposed rule addresses the siting of commercial photovoltaic solar energy generation facilities. Currently, solar facilities may be sited on EFU-zoned lands as a conditional use, without having to take an exception to Statewide Planning Goal 3, Agricultural Lands. Commercial solar energy sites of over 100 acres need to obtain a siting certificate from the Energy Facility Siting Council (EFSC). The proposed rules would provide incentives for siting solar facilities on non-arable lands, as opposed to high value and arable farmlands.

**B. INITIATION OF RULEMAKING**

HB 2229 (2009) rulemaking: LCDC approved a 2009-11 policy agenda that contained rulemaking related to HB 2229 "Big Look" (2009). Staff work relating to this rulemaking is now due for implementation. However, HB 3615, recently introduced in the House, would allow or perhaps require LCDC to approve regional definitions of farm and forest lands based on work performed by Douglas, Jackson and Josephine counties. If HB 3615 passes, HB 2229 rulemaking would probably be irrelevant, because it is predicated on reanalyzing lands that were possibly mis-zoned based on current definitions of farm and forest lands in statewide planning Goals 3 and 4. For the time being, the department intends to put the HB 2229 rulemaking on hold, while researching the definition and application of carrying capacity, and researching components for a new definition for forest lands.

**C. OTHER POLICY ACTIVITIES**

The department met with Portland State University and Oregon Consensus in March and April to discuss the proposed Urban Forum regarding population forecasting.